



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1995

Ms. Elaine L. Fannin
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR95-807

Dear Ms. Fannin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33609.

The Department of Agriculture (the "department") received an open records request for information related to a complaint regarding the improper use of pesticides. You state that the complaint at issue is being reviewed currently by the department's legal staff to determine if a violation of the Texas Agriculture Code occurred and if administrative penalties should be assessed. You state that if the department's legal staff determines that a violation occurred, then the department fully intends to prosecute the case. You contend that the information requested is excepted from the required public disclosure by section 552.103(a) of the Government Code. You have submitted for our review documents responsive to the pesticide complaint at issue.

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. For purposes of section 552.103(a), this office considers a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, to be litigation. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

The department is authorized to investigate pesticide related complaints pursuant to section 76.151 of the Agriculture Code. Additionally, the department may assess penalties for violations of chapter 76 of the Agriculture Code pursuant to section 76.1555. In this instance, the department has supplied this office with information that shows litigation is reasonably anticipated. After reviewing the documents submitted, we conclude that they are related to reasonably anticipated litigation for the purposes of section 552.103(a).

Our review of the submitted records indicates that some of the information at issue has already been seen by the opposing party in the anticipated litigation. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982) (concerning pesticide complaint investigation files); Open Records Decision No. 350 (1982) at 3.

However, among the documents submitted to this office for review are medical records of one of the complainants. You contend that these medical records are confidential and are excepted from required disclosure by section 552.101 of the Government Code. Information that is confidential may not be released even after the litigation has concluded.

The medical records submitted are governed by the Medical Practice Act ("MPA"), V.T.C.S. article 4495b. Section 5.08(b) of the MPA provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician" are confidential. Records must be kept confidential under article 4495b only if they are actually prepared or maintained by a physician. Attorney General Opinion JM-229 (1984) at 2; Open Records Decision No. 343 (1982) at 1. Access to these records is governed by the MPA rather than by chapter 552 of the Government Code. Open Records Decision No. 598 (1991) at 1; *see* Open Records Decision No. 565 (1990) (release of medical records). When access to records is governed by provisions outside of chapter 552 of the Government Code, exceptions under chapter 552 are not applicable to the release of the records. Open Records Decision No. 598 (1991) at 1. You may release these records only as provided under the MPA.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Kathryn P. Baffes". The signature is fluid and cursive, with the first name "Kathryn" being the most prominent.

Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/RHS/rho

Ref: ID# 33609

Enclosures: Submitted documents

cc: Mr. Randall L. Meredith
2805 Lawnview
Corpus Christi, Texas 78404
(w/o enclosures)